In 1202 Count William of Montpellier persuaded the archbishop of Arles to intercede with the pope concerning the legitimization of the count's bastard children. It was not that he wanted his boys to be eligible to become priests, the usual reason for a papal dispensation \textit{ex defectu natalium}; the count was anxious that his children should enjoy all the rights of legitimate offspring in the temporal sphere as well. Pope Innocent III had recently granted this privilege to the children of King Philip II by Agnes de Meran, and Count William hoped to obtain a similar favor.

The pope refused this request. He had just reached an agreement with Philip about the king's matrimonial difficulties and no doubt did not wish to provoke him anew by an officious intervention in a case that evidently pertained to the royal jurisdiction. But Innocent III was not content to leave the matter at that. He wanted there to be no doubt that the pope did have extensive powers in secular affairs even though he was not choosing to exercise them in this particular case. Hence his reply to Count William was cast in the form of the famous decretal \textit{Per Venerabilem} in which Innocent took advantage of this relatively trivial occasion to inject into the mainstream of mediaeval canon law a series of far-reaching pronouncements concerning the juridical rights of the pope in secular disputes. The decretal was included first in the unofficial compilation of Alanus and then in the officially promulgated collection of canons known as the \textit{Compilatio Tertia}. Innocent ensured that no jot or tittle of his carefully chosen terminology should pass into oblivion or lack adequate canonistic exegesis when he sent a copy of this compilation to the university of Bologna with instructions that henceforward it was to be used "tam in iudiciis quam in scholis." The pope's phrases were indeed discussed eagerly in the schools by generations of mediaeval canonists; more recently their implications have been debated with almost equal vigor by modern historians.
The decretal was full of meat. Innocent's apparently innocuous, incidental comment that the king of France recognised no temporal superior provided a canonical basis for a whole theory of the independence of national kingdoms from the empire, which in turn has given rise to an elaborate controversy among modern historians about the origins of national sovereignty in Europe. As for the immediate occasion of the letter, the pope held that authority to legitimize for spiritual functions necessarily included a capacity to legitimize in the temporal sphere as well "because for spiritualities greater care and authority and worthiness are required." This also gave rise to an important canonical controversy. But the greatest significance of the decretal for students of mediaeval political theory lies in the fact that, having made these points and having protested that he had no wish to usurp the jurisdiction of another, Innocent went on to give a more general explanation of the pope's right to intervene in secular affairs:

Rationibus igitur his inductis regi gratiam fecimus requisiti, causam tam ex veteri quam ex novo Testamento trahentes quod non solum in ecclesie patrimonio (super quo plenam temporalibus gerimus potestatem) verumetiam in aliis regionibus, certis causis inspectis, temporalem iurisdictionem casualiter exercemus.

The Old Testament proof was a passage from Deuteronomy (xvii. 8-12) "If thou perceive that there be among you a hard and doubtful matter in judgment between blood and blood, cause and cause, leprosy and leprosy; and thou see that the words of the judges within thy gates do vary: arise and go up to the place which the Lord thy God shall choose. And thou shalt come to the priests of the Levitical race and to the judge that shall be at that time . . . And thou shalt do whatsoever they shall say." The New Testament was cited (Matthew xvi. 19, "Whatsoever thou shalt bind on earth it shall be bound in heaven") to demonstrate that in the new dispensation the apostolic see was evidently the "chosen place" of God, and the pope himself the judge who presided there. And so Innocent reached his conclusion:

Tria quippe distinguit iudicia: Primum inter sanguinem et sanguinem, per quod criminale intelligitur, et civile. Ultimum inter lepram et lepram per quod Ecclesiasticum, et criminale notatur. Medium inter causam et causam, quod ad utrumque refertur, tam Ecclesiasticum quam civile; in quibus cum aliquid fuerit difficile, vel ambiguum, ad iudicium est Sedis apostolicae referendum: cuius sententiam qui superbiens contempserit observare, mori praecipitur, id est per excommunicationis sententiam velut mortuus a communione fidelium separari.

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* X. 4. 17. 13; Migne, PL, ccxiv, 1132.

* X. 4.17.13; Migne, PL, ccxiv, 1133. A. Hof called attention to the similarity between Innocent's claim here and the appellate jurisdiction attributed to the emperor in Roman law, " 'Plenitudo potestatis' und 'Imitatio imperii' zur Zeit Innocenz III.," Zeitschrift für Kirchengeschichte, lxvi (1954-55), 39-71 at 64.
The interpretation of this passage is of crucial importance for the whole much-controverted question whether Pope Innocent III was essentially "dualistic" or "hierocratic" in his theory of the relations of church and state. It was already well established that in the strictly ecclesiastical sphere all "hard and doubtful matters," the so-called causae arduae, were to be referred to the apostolic see for decision. The question is whether Innocent was simply extending that claim to the sphere of secular jurisdiction or whether his words were intended to convey some other meaning. It happens that the two outstandingly superior textbooks on mediaeval political theory in current use offer distorted interpretations of the pope's words and that the distortion has not been discussed, nor the passage adequately analysed in any of the recent specialist works on Innocent's political theory. A note of correction therefore seems in order.

A. J. Carlyle saw in Per Venerabilem only a claim that "in cases of conflict between the spiritual and temporal jurisdiction, the spiritual power is to decide."9 C. H. McIlwain similarly supposed that the "third judgment" referred only to those matters that were "in the first instance concurrently within the jurisdiction of both temporal and spiritual courts." With his usual discernment, however, McIlwain added that this was not the only possible interpretation of the passage. "If the words 'in these'... refer back to all three kinds of jurisdiction, then the interpretation above is wrong, and Innocent IV later added practically nothing to the claim of his predecessor."10

Innocent III's grouping of clauses does suggest that he intended the "in quibus" to refer particularly to the third type of judgment. But it seems quite certain that he did not intend to exclude the first two types of cases from papal jurisdiction, and there can be no reasonable doubt that, in the third class of cases, he intended to include all lawsuits, whether ecclesiastical or secular, and not merely those cases that had an ecclesiastical as well as a secular aspect.

As to the first point, one has only to consider the nature of the first two types of judgment. One of them was "ecclesiasticum et criminale." That is to say it had reference to criminal cases that fell within the jurisdiction of the spiritual courts, such as heresy or sacrilege. Obviously the pope was not intending to exclude himself from the role of judging such cases; the very essence of the papal position was to be supreme judge, iudex ordinarius omnium, at least in spiritualities. The other class of criminal cases mentioned, "inter sanguinem et sanguinem," was defined as "criminale... et civile." That is to say it referred to crimes like murder or assault normally cognizable before a secular judge. But Innocent could not have intended to exclude matters of this kind from the sphere of papal judgment for, in the decretal Novit (1204), he explicitly claimed the right to intervene in such cases.11

9 R. W. and A. J. Carlyle, A History of Mediaeval Political Theory in the West, ii (London, 1909), 233. Cf ibid., p. 232, "[Innocent] urges that the Pope occupies the position of the priest in the Deutero-nomic legislation, and that this principle applies especially to those cases where there is any uncertainty whether the matter belongs to the ecclesiastical or the secular authority."

cases *ratione peccati*. A crime of violence was also a sin, and all cases involving sin pertained to the papal jurisdiction according to Innocent.\textsuperscript{11}

The ambiguous definition of the third class of cases ("inter causam et causam quod ad utrumque refertur tam ecclesiasticum quam civile") offers greater difficulties of interpretation. The first argument against the view of Carlyle and McIlwain that Innocent's words referred only to cases where the spiritual and temporal jurisdictions overlapped is an *argumentum ex silentio*. It did not occur to any contemporary canonist that the pope's phrases could possibly have the meaning attributed to them by the modern historians. The point is of some significance, for several of the early commentaries on the *Compilatio Tertia* were written by canonists who are known as convinced dualists, e.g., Laurentius Hispanus, Vincentius Hispanus, and Johanes Teutonicus. These men were all interested in defending the essential autonomy of the secular power against the hierocratic views of contemporaries like Alanus and Tancred who maintained that supreme spiritual and temporal power were united in the pope. If Innocent's words could have meant to a contemporary merely that the pope was claiming jurisdiction when some "ambiguity" arose concerning a case which was "concurrently within the jurisdiction of both spiritual and temporal courts," either Laurentius or Vincentius or Johannes would have been delighted to point out the fact. None of them did so. Laurentius, the only one who referred specifically to the words of Deuteronomy in his glosses on *Per Venerablem*, did maintain that the text was not necessarily a vindication of Alanus's extreme hierocratic doctrine of papal power, but he adopted a different line of argument to establish his point.

*Regionibus*. Scilicet cum requirimur et hoc probat auctoritate deuteronomi cum sicilicet variatum est inter iudices, arg. supra, de *foro comp. Licet* la.

*Usurpare*. Immo licet ex certis causis. Non ideo ordinarius quo ad temporalia, arg. supra, de officio ordinarii, *Pastoralis §Ex parte* la.\textsuperscript{12}

\textsuperscript{11} Potthast 2181; Migne *PL*, ccxv, 325-328; *Comp. III*, 2.1.3; X. 2.1.3. "We do not intend to judge concerning a fief ... but concerning sin, the judgment of which undoubtedly belongs to us ... Now we can proceed in this fashion against any criminal sin to recall the sinner from vice to virtue, from error to truth, but especially so when it is a sin against the peace which is the bond of charity." In canonical discussions of the pope's right to judge secular suits the *ratio criminis* was always mentioned as one ground justifying such action. Cf. *infra*, p. 52.

\textsuperscript{12} Cited by Vincentius Hispanus, *Apparatus ad Comp. III*, MS. Melk 833, fol. 227rb (with the siglum la [urentius]). The glosses occur in garbled form in the mixed apparatus of Karlsruhe Aug. XI, fol. 208va and were also cited by Bernardus Parmensis in his *Glossa Ordinaria ad X*. 4.17.13 s.v. *Certi causa*. For the glosses on *Per Venerablem* in the so-called Laurentius apparatus to the *Comp. III* see F. Gillmann, *Des Laurentius Hispanus Apparat zur Compilatio III* (Mainz 1905). The dispute concerning the authorship of this apparatus and of the other glosses attributed to Laurentius by later canonists is not of the first importance for our argument. (The relevant literature is cited by A. M. Stickler, "Laurent d'Espagne," *Dictionnaire de droit canonique*, vi (1955), col. 364.) The point is that, so far as we know, none of the early glossators of *Per Venerabilem* thought it possible to extract a dualistic significance from the sentence beginning "Tria quippe distinguunt iudicium." Those of them who did adhere to the dualist position preferred to concentrate on the earlier part of the decretal, arguing that the claim to legitimize did not in itself constitute an assertion of direct temporal power. See, e.g., the glosses cited by Gaines Post, "Some Unpublished Glosses on the Translatio Imperii and the Two Swords," *Archiv für katholisches Kirchenrecht*, cxvii (1937), 403-429 at p. 428 and those referred to *supra*, n. 6.
The distinction Laurentius made was not between secular cases and mixed cases but between appellate jurisdiction and ordinary jurisdiction. Alanus, on the other hand, maintained that the pope was "iudex ordinarius ... et quoad spiritualia et quoad temporalia." The argument that ecclesiastical courts could exercise jurisdiction in mixed cases (the so-called ratio connexitatis) was, of course, not unfamiliar to canonists of the early thirteenth century. Indeed one may doubt whether Innocent would have thought it necessary to invoke Peter and Paul and an Old Testament prophet to establish such a relatively modest claim. We can demonstrate further that he conveyed a different meaning to contemporaries by considering some comments on the ratio connexitatis itself. From about 1215 onwards it became a common practice among the decretalists to present lengthy lists of all the cases in which papal jurisdiction could be exercised in the temporal sphere. Such lists invariably mentioned the ratio connexitatis and they invariably mentioned the decretal Per Venerabilem. But they did not cite Per Venerabilem in support of the claim to jurisdiction ratio connexitatis; it was always cited as the basis of a quite different claim. Thus Tancred wrote (citing Laurentius in the first part of his gloss):

This is one case in which the ecclesiastical judge can concern himself with matters of secular jurisdiction, namely when no superior is to be found. Another is when the secular judge neglects to render judgment or do justice. A third is when any matter is difficult and ambiguous and the judges differ, as below in the title Qui filii sint legitimi, Per venerabilem. La(urentius). Fourth, when it is a matter of land subject to the jurisdiction of the church. . . . Fifth, if it is according to custom . . . . Sixth, in all ecclesiastical crimes . . . . Seventh, when any case is referred to the church through denounced by reason of crime, as above in the previous title, Novit. Eighth, when the secular judge is suspend and accused . . . Ninth is the reason of connection, for an ecclesiastical judge can judge concerning dowry by reason of the fact that he has jurisdiction in matrimonial cases, as above in the title De dote post divorium, De prudentia.14

11 Gloss ad Comp. 1, 2.20.7, MS. Karlsruhe Aug. XL, fol. 13vb. This famous text was first printed by J. F. von Schulte in Sitzungsberichte der kaiserlichen Akademie der Wissenschaften in Wien, philos. hist. Klasse, lxvi (1870), 89. It has been frequently cited in more recent works. Alanus's comment on Per Venerabilem itself expressed the same outlook, " . . . secundum nos Papa super principem est etiam in temporibus et ideo habet potestatem legitimandi quoad actus seculares," MS. Vercelli 89, fol. 108va cited by A. M. Stickler, "Sacerdozio e regno nelle nuove ricerche," Miscellanea Historiae Pontificiae, xviii (1953), 1-26 at p. 23. The most recent discussion of Alanus's political theory is also by Stickler, "Alanus Anglicus als Verteidiger des monarchischen Papsttums," Salesianum, xxii (1959), 846-406. This article presents a valuable analysis of the two recensions of Alanus's apparatus, Ius Naturale.14

14 "Iste est ergo unus casus in quo iudex ecclesiasticus potest se immiscere seculari jurisdictioni, scil. cum superior non invenitur. Alius est, cum iudex secularis negligent iudicium vel iustitiam facere ut J. c. prox.; ar. XXXIII q. iv, administratores. Tertius cum aliquid fuerit ambiguum et difficile et variatur inter iudices: J. qui filii sint legit., per venerabilem la. § quartus, cum est de terra supposita jurisdictioni ecclesie. . . . Quintus, si est de consuetudine. . . . Sextus in omni crimine ecclesiastico. . . . Septimus, cum per denuntiationem ratione criminis aliqua causa ad ecclesiam defertur, ut S. tit. prox., novit. Octavus, cum iudex secularis est suspectus et recusatur. . . . Nonus est ratio connexitatis, quia potest iudex ecclesie iudicare de dote, ex quo cognoscit de matrimonio ut S. de dote post divorium, de prudentia" (Apparatus ad Comp. II, 2.1.3, MS. Vat. lat. 2509, cited by Stickler, "Sacerdozio e regno," p. 24). The first part of the gloss, attributed by Tancred to Laurentius, occurs separately in MS. Karlsruhe Aug. XL, fol. 152va.
This gloss was copied with little variation by Goffredus Tranensis and Bernardus Parmensis, and its substance repeated by Innocent IV and Hostiensis. Each of them cited the decretal *De Prudentiia* on the law of dowry to illustrate the *ratio connexitatis*, while each cited *Per Venerabilem* in support of the much more vague and far-reaching claim to a jurisdiction in secular cases whenever the issues proved "ambiguous" or "difficult" or when the judges were at odds with one another.

Finally, when the canonists did come to gloss in detail the words "Tria quippe distinguit iudicia" their interpretations regularly explained the third judgment as referring to cases which were *either* secular *or* spiritual, not both secular and spiritual at the same time. Innocent IV described the three judgments in this fashion:

*Sanguinem.* A judgment is between blood and blood when the accuser says it is proved that the defendant has shed blood, that is, has committed any civil crime, let us say homicide, adultery, theft or anything of that sort. *Inter lepram et lepram.* When the accuser says, "You are infected with the leprosy of heresy," that is, with any ecclesiastical crime, let us say simony, sacrilege, or anything similar, and the accused denies it. *Inter causam et causam.* When the plaintiff says, "You owe me [a sum] from a loan or contract," or some similar civil action. Or, again, [when the plaintiff says] "You are bound to pay tithes to me" or "I have the right of patronage in this church," or some similar civil and ecclesiastical action, but the defendant denies it. For in all these matters, if anything shall be difficult or ambiguous recourse is to be had to the apostolic see.  

There were thus really four types of cases involved — criminal actions which could be either ecclesiastical or secular, and civil actions which could likewise be divided into ecclesiastical cases or secular cases. The lack of symmetry in Innocent III's exposition in which both types of civil suit were lumped together under one heading arose simply from the structure of the text of Deuteronomy that he was expounding.

Hostiensis and Abbas Antiquus reproduced almost verbatim the comment of Innocent IV and a very similar explanation was given by Boatinus Mantuanus.

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17 Hostiensis, *Commentaria ad X.* 4.17.15 (interpolated in *Glosa Ordinaria*, ed. cit. col. 1544); Abbas Antiquus, MS. Vatican Borgh. 231, fol. 115va; Boatinus Mantuanus, MS. Vienna, Staatsbibliothek 2113, fol. 196va. *Per quod criminales intelligitur et civilibus i.e. crimine ciuile ut si dicatur, tu sanguinem exestigi et probetur ei reus negat. Si de hoc dubitetur recurrendum est etc. Per quod ecclesiasticum et criminale notatur i.e. crimine ecclesiasticum ut heresis, symonia etc., ut si quis diest se probasse aliquem esse hereticum et reus negat et de hoc dubitetur recurrendum est etc. Ad utrumque reftert tam ecclesiasticum quam ciuile, ecclesiasticum ut si egatur de decemis et de hoc dubitetur,
I do not think that there can be any question here of a "hierocratic" distortion of Innocent III's original meaning. No other meaning had been suggested. The mid-thirteenth-century canonists were merely giving concrete examples to illustrate an interpretation that had been taken for granted by their predecessors. The principal reason why a modern reader might suppose that the third type of jurisdiction was intended to apply only to mixed cases lies in the fact that the immediate occasion of the decretal was a matter of legitimization, which did fall into this category. But, in the paragraph that we have been considering, Innocent III had turned aside from the issue of Count William's offspring to offer some general observations about the nature and extent of papal jurisdiction. It was not the habit of the canonists to relate such observations solely to the subject matter of the decretal in which they occurred; rather they sought to educe from them general rules of law, as in the comments of Tancred just cited. Innocent III himself was of course well aware of this decretalist technique. In general, it seems to me, the argument that Innocent's true meanings were misunderstood or distorted by the canonists of the next generation should be viewed with extreme caution. The pope was himself a trained canonist and a legislator of genius. He knew exactly what legal implications the canonists would find in the terms he chose to use, and we must surely suppose that he had a shrewd understanding of the effects they were likely to have on the long-range growth of canonical thought.

Paulus Hungarus, in his Notabilia ad Comp. III, briefly observed that Per Venerabilem referred to a three-fold division of legal cases and added that there existed a fourth class of cases known as "mixed," "Nota quod triplex est species causarum, scilicet criminalis, civile et spiritualis . . . Quarta species est mixta ut matrimonia . . ." (MS. Melk 333, fol. 226vb). The only canonist I have noticed who used the word "mixed" to describe Innocent's third class of cases is Johannes de Deo in his Caeusa ad X. 4.17.13. MS. Vatican lat. 2343, fol. 46va. "Tertio dicit quid sit inter lepram et lepram et dicit quod est iudicium ecclesiasticum et criminales et dicit quod est iudicium civilium et euiile, et quid sit inter sanguinem et sanguinem et dicit quod mixturn iudicium, scilicet tarn ecclesiasticum quam euiile et qui pape obedire noluerit in predictis per excommunicationis sententiam condempnatur." This preserves the ambiguity of the decretal itself, but, even in this case, I think the meaning Johannes intended to convey was the same as that of the other canonists cited, i.e., the third judgment was "mixed" in that it referred to both ecclesiastical and to secular cases.

One possible source of misunderstanding lies in the use of the word civile in Per Venerabilem. The third class of cases included all "civil suits" (as we should say) as distinct from criminal suits. Innocent III, however, was consistently using the word civile, not in opposition to criminales but in opposition to ecclesiasticum. That is to say he used civile as a synonym for seculare. Some of the canonists thought it necessary to point this out, e.g., Tancred, Apparatus ad Comp. III, 4.12.2. Florence, Laurenziana S. Croce IV sin 2, fol. 223va, s.v. Civile, and Bernardus Parmensis, Glossa Ordinaria ad X. 4.17.13, s.v. Civile. Others, like Paulus Hungarius, cited above, used civile in a different sense to distinguish civil cases from criminal cases. Innocent IV's comment contained both usages, but in an additional gloss on the word criminales he made it clear that he had understood Innocent III correctly, "Criminales. Idem vult intelligere criminales et civile non diversa . . ." (Commentaria, p. 238). This minor confusion of terminology does not seem to indicate any underlying confusion of thought. The much more common canonistic usage was indeed to oppose civile to criminales. Many examples are given by Stickler, "Imperator Vicarius Papae," Mitteilungen des Institutes für Österreichische Geschichtsforschung, LXXII (1954), 164-213 at pp. 177-179.
A new period in the study of Innocent’s political ideas began with the publication in 1940 of Maccarrone’s *Chiesa e stato*, the first work that seriously attempted to analyse his thought within its canonistic framework. Subsequently major contributions by Mochi Onory, Kempf, Stickler, and Tillmann have clarified our understanding of many doubtful points. It seems arguable, however, that all of these writers have been unduly influenced in their exegesis of *Per Venerabilem* by a natural inclination to defend Pope Innocent III against the charge of seeking worldly power as an end in itself. They are anxious, that is to say, to establish that the great pope was not actuated by motives of gross worldly ambition, but that all his interventions in the political sphere were inspired “by motives of a spiritual order” (a favorite phrase of Mochi Onory). Let us acknowledge at once that Innocent’s intentions were probably of the best. It is, heaven knows, no mean task to try to build the City of God on earth. But it also remains true that, after his pontificate, many theologians and some popes did become committed to a doctrine of papal temporal power that was repugnant to the consciences (as well as the interests) of most mediæval princes and prelates, that this papal claim produced a destructive tension in mediæval Catholicism, and that Innocent III’s decretals played a significant part in its development. The problem of whether he had good intentions is one issue, primarily psychological; the problem of what exactly he did claim in the secular sphere is another, primarily canonical. Both are important, but to endeavor to solve the second problem merely on the basis of a conviction about the first leads only to confusion.

This seems especially the fault of Mochi Onory. Above all he failed to see — and this is true of Maccarrone too — that there was a radical difference between a papal claim to exercise indirect power in temporal affairs and a claim to exercise direct power in certain exceptional circumstances which the pope himself undertook to define. It was quite consistent with the dualist theory to emphasise that an exercise of spiritual jurisdiction by the pope might sometimes, indirectly, produce effects in the temporal sphere. A sentence of excommunication launched against a king for some specifically ecclesiastical offense like sacrilege might, for

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19 This aspect of Innocent III’s legislative activity was well emphasized by L. Buisson, *Potestas und Caritas* (Cologne-Graz, 1938), p. 67.


21 Maccarrone, op. cit., pp. 109–110, treated papal jurisdiction ratione peccati as essentially similar to the jurisdiction, certis causis inpsectis, claimed in *Per Venerabilem*, and claimed that neither involved any direct exercise of papal temporal power. Similarly Mochi Onory, op. cit., p. 276, referring to the views of Laurentius, “Sostentore del principio della jurisdizione divisa, e del carattere essenzialmente indiretto dell’ autoria in temporalibus del pontific ( . . . nisi in subsidium, cum secularis est negligens, vel imperio vacat . . .)"
example, have political repercussions. But it was surely not consistent with the
dualist position for a pope to claim that he could exercise jurisdiction in secular
cases whenever the case happened to be a "difficult and ambiguous" one (as was
claimed in *Per Venerabilem*) or whenever the temporal judge was negligent or
suspect or the office of emperor vacant (as Innocent suggested in the decretal
*Licet*):

\[
\text{Si vacat imperium, si negligit, ambit, an sit}
\]

\[
\text{Suspectus iudex . . .}
\]
as Hostiensis put it, summarising Innocent III's doctrine.\(^{22}\)

It is hard to see how a pope could claim to judge secular cases even in such cir-
cumstances, or to enforce his sentences with coercive sanctions, unless he sup-
posed that the nature of his office was such as to include jurisdiction over the
purely temporal issues involved. Helene Tillmann is the only modern writer who
has emphasised the important distinction between indirect power and direct
power exercised *in certis causis*, but even she obscured its full implications by
maintaining that the papal claim was rooted in the medieval doctrine of neces-
sity.\(^{22}\) Innocent III certainly did know the Roman law tag, "Necessitas legem non
habet," and he could have used it as the basis of a claim to temporal jurisdiction in
exceptional circumstances. But the fact is that he did not choose to do so. The
legal doctrine of necessity, if applied to the transfer of cases between secular and
ecclesiastical courts, might have had uncomfortable consequences. It could after
all have worked both ways. No thirteenth-century pope would have conceded
that the emperor could judge a spiritual case (on the ground that "necessitas
legem non habet") whenever the ecclesiastical judges found the matter "difficult
and ambiguous" or when the papacy happened to be vacant. Innocent III, there-
fore, preferred to base his claim on the quite different ground that he was the
vicar of one who was a priest after the order of Melchisedech — and Melchisedech
was of course both priest and king.\(^{24}\) On this theory the pope could judge secular
cases when he considered it appropriate to do so simply because regal jurisdiction
inherited in his office (and, correspondingly, the emperor could not judge spiritual
cases because he possessed no spiritual jurisdiction).

Friedrich Kempf avoided this conclusion in his discussion of *Per Venerabilem*

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\(^{22}\) Hostiensis ad X. 2.2.10 (the decretal *Licet*), interpolated in *Glosa Ordinaria*, ed. cit., col. 547.

\(^{23}\) "Zur Frage," p. 139. Kempf referred to Tillmann's distinction but attached little importance to
it (op. cit., p. 264, n. 4). In another context he ignored it altogether, "Er übt in diesem Fall wiederum
nur casualiter, certis causis in specieae seine potestas indirecta in temporalibus aus" (p. 279).

\(^{24}\) "Eius vicarius, qui est Sacerdos in aeternum secundum ordinem Melchisedech, constitutus a
Deo Iudex vivorum et mortuorum. Tria quippe distinguit iudicia . . . ." The explanation put forward
by Maccarrone of the basis of Innocent's claim seems to me quite unconvincing: " . . . la presente
decretale ha come fondamento diritti storici e consuetudinarii . . . . Infatti, come abbiamo accennato
il principio del ricorso all'autorità ecclesiastica in determinati casi e chiaramente basato sulla legis-
lazione giustinianea . . . ." (op. cit., p. 123). Maccarrone's own preceding exegesis of *Per Venerabilem*
emphasized its essentially theological basis. In the decretal *Noet* (supra, n. 11) Innocent did refer
to Roman law as a possible basis for the exercise of temporal jurisdiction by the pope, but brushed it
aside as irrelevant. "In humility we pass over what Theodosius decreed . . . .since we do not depend
on any human constitution but rather on divine law, for our power is not from man but from God."
by stressing the voluntary nature of the jurisdiction involved. He did not argue that Innocent was claiming merely *iurisdictio voluntaria* in the most technical sense of that term (as opposed to *iurisdictio contentiosa*) but he did maintain that, in *Per Venerabilem*, Innocent asserted the right to judge a secular case only when all the parties in the case voluntarily selected him as an arbitrator. There seems nothing in the decretal itself to support such a view. Its tone is quite different—"cum aliquid fuerit difficile vel ambiguum ad iudicium est sedis apostolicae recurrendum cuius sententiam qui superbiens contempsit observare mori praecipitur..." Kempf also argued that *Per Venerabilem* must be interpreted in the light of Alexander III's decretal *Cum Sacrosancta*, and so understood in a dualist sense. In this earlier decretal Alexander replied to a series of questions from the archbishop of Rheims. The last one enquired whether an appeal from a secular judge to the pope was valid and the pope replied: "... etsi de consuetudine ecclesiae teneat (appellatio), secundum iurisrigorem credimus non tenere." Kempf sees in this a definitive acknowledgment by the papacy of the autonomy of secular jurisdiction. Alexander did not, however, make any pronouncement at all in his decretal on the essentially theological issue of the inherent temporal power which might, or might not, be attributed to the papacy on the basis of such scriptural texts as Matthew xvi. 19. He indicated only that, as a matter of law, there was no adequate basis in the existing canons for a general right of appeal (though the custom of a local church sufficed to make the appeal valid). It was quite open to a future pope, who held on theological grounds that Christ had conferred on the papacy a supreme temporal jurisdiction, to enact such canons as he thought necessary to define the circumstances in which that jurisdiction would in fact be exercised. That is exactly what Innocent III did.

A. M. Stickler has insisted that the very occurrence in canonistic works of lists of "exceptional" cases in which secular jurisdiction would be exercised directly by the pope proves that, even in mid-thirteenth century, the canonists acknowledged in principle the autonomy of the secular power; and he suggested that the presence of such lists in the writings of extreme hierocrats like Tancred and Hostiensis reflects an unresolved tension in their thought. It is true that some dualist writers did hold that the fact of papal jurisdiction in secular cases being exercised

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25 This was a possible line of argument. On the specific issue of legitimization Vincentius Hispanus wrote, "Per hoc non probasse iurisdictionem habere temporallem cum legimitare aliquando sit iurisdictionis voluntaria" (MS. Melk 883, fol. 226v). In Roman and canon law *iurisdiction voluntaria* referred to a fictitious suit where there was no real dispute between the parties (as in cases of manumission or adoption) as opposed to *iurisdiction contentiosa*, where there was a real dispute between the parties. Vincentius did not suggest that the subsequent exegesis of Deuteronomy referred only to cases that fell under the *iurisdiction voluntaria*. Both Molitor (*op. cit.*, pp. 59-61) and Kempf (*op. cit.*, pp. 260-262) discussed this point and both came to the conclusion (Kempf reluctantly) that the passage beginning "Tria quippe distinguat iudicia" could not be regarded as referring to *iurisdiction voluntaria* in this technical sense.


only occasionally and in exceptional circumstances constituted an argument in favor of their own point of view. But their position was a very uneasy and illogical one, and it was natural enough that, after a generation's discussion of Innocent III's legislation, a major shift had occurred in canonistic thinking from the prevailing dualism of the late twelfth century to the dominant hierocratism of the mid-thirteenth. As we have argued, some of the "exceptional" cases were consistent with a dualist position, but some were not. On the other hand, the detailed definition of specific cases in which papal jurisdiction would be exercised directly in temporal affairs was entirely consistent with the most extreme hierocratic theories. Any court that claims a supreme appellate jurisdiction needs to define the circumstances in which it will in fact entertain appeals. It is quite possible to possess jurisdiction legitimately without exercising it in all cases; it is not possible to exercise jurisdiction legitimately in any case without possessing it. We may add that the listing of these exceptional cases occurs not only in the works of the canonists (whose technique of presenting scattered comments on a given topic in widely separated contexts could easily lead to inconsistencies) but also in the orderly exposition of the hierocratic theme by a systematic philosopher like Giles of Rome, who evidently saw no inconsistency in this procedure. Giles maintained that all power, spiritual and temporal, was vested in the pope, that sometimes he wielded his temporal authority directly but more commonly permitted it to be exercised by secular rulers. He went on to mention seven specific cases (based on the canonical exceptions) where the pope actually exercised the universal temporal jurisdiction that pertained to his office, one of them being the "hard and doubtful" matter referred to in the decretal Per Venerabilem. Once again there is no question here of a hierocratic distortion of the pope's original meaning. Innocent himself had indeed spelled out precisely the same doctrine towards the end of Per Venerabilem itself: "Paul also, that he might expound the plenitude of power, wrote to the Corinthians saying 'Do you not know that you shall judge angels? How much more the things of this world.' And so [the pope] is accustomed to exercise the office of secular power sometimes and in some things through himself, sometimes and in some things through others."

Innocent did not consider it appropriate or desirable to exercise his jurisdiction over spiritual affairs and over temporal affairs in precisely the same fashion, and he pointed this out in Per Venerabilem. In the ecclesiastical sphere he was \textit{index ordinarius omnium}; in the temporal sphere he had no intention of burdening the papal curia with a mass of petty feudal litigation that, by legitimate custom, belonged to the courts of secular rulers. He did want to ensure that the temporal jurisdiction of the papacy could be invoked whenever a secular case had political implications involving the peace and good order of Christendom, and his various decretals provided a canonical basis for appeals in all such cases. Again, Innocent did take it for granted that, under the pope, secular rulers had a permanent and necessary role to play in the governance of Christian society, and that this role was a part of the divinely ordered scheme of things. He assumed that two hier-

\footnote{R. Scholz, \textit{Die Publizistik zur Zeit Philippus des Schönen} (Stuttgart, 1903), p. 81.}
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archies of administration were necessary for the government of the Christian world but, in his view, both hierarchies culminated in the pope. If this constitutes dualism, as some modern students of Innocent's thought seem to suppose, then all the mediaeval popes and all the most papalist of mediaeval theologians were dualists. It did not occur to Innocent III or his successors that it lay within their competence simply to abolish the offices of all secular rulers and themselves assume the exercise of all temporal power. But it also lay quite outside their competence, in the ecclesiastical sphere itself, to abolish the office of bishop and rule all the affairs of the church through papal delegates. Either innovation would have grievously perturbed "the general state of the church," which was not permitted to a pope or any human legislator.29

The recent work on Pope Innocent III has been much concerned with relating his ideas to their mediaeval background. This is all to the good. It needs to be emphasised that the theory of papal power he propounded bore little resemblance to modern positivist theories of sovereignty and still less to modern totalitarian theories of despotism. We shall, however, eventually come to a full understanding of Innocent's position, not by minimising his plainly stated claim to temporal power, but by relating that claim to the complex of doctrines concerning natural law, counsel and consent, status ecclesiae, and customary rights that mediaeval popes as well as their critics took for granted.

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29 On this see "Pope and Council: Some New Decretist Texts," Mediaeval Studies, xix (1957), 197-218, which has references to other recent literature.